Supreme Court, U.S.
FILED
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No. 99-1872

In The Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RICARDO AHUMADA-AGUILAR, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF REASONS FOR DENYING A WRIT OF CERTIORARI

The Solicitor General seeks review of three questions. The first question presented -- whether Mr. Ahumada-Aguilar has third party standing to assert his father's equal protection claim -- should be found to have been waived by the Government because it failed to timely raise this prudential "rule of restraint" in the district and circuit courts. Moreover, the question does not merit certiorari review because it presents no conflict among the circuits and no compelling federal question. Furthermore, under established

principles of third party standing, Mr. Ahumada-Aguilar has standing to raise his father's equal protection claim.

The second question presented is whether Title 8, U.S.C. § 1409(a) violates equal protection. The Third, Fifth and Ninth Circuits agree that heightened scrutiny is the appropriate standard of review, but a conflict exists on the narrower issue of the application of the standard. The Fifth Circuit concludes that the statute survives heightened scrutiny, while the Third and Ninth Circuits conclude that such gender-based classifications are invalid. *Compare Nguyen v. INS*, 208 F.3d 528 (5th Cir. 2000), *petition for cert. filed,* (U.S. June 26, 2000) (No. 99-2071) (Section 1409(a) passes heightened scrutiny) *with United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999) (§§ 1409(a)(3) *and* (4) do not pass heightened scrutiny) *and Breyer v. Meissner,* No. 98-1842, 2000 WL 727508, at *8-*9 (3d Cir. June 6, 2000) (finding acquired citizenship provision applicable to foreign-born children of U.S. citizen mothers born prior to 1934 unconstitutional under heightened scrutiny analysis). While the Fifth Circuit's conflict with the Ninth and the Third Circuits on the narrower question of whether these gender distinctions pass heightened scrutiny may be a basis for certiorari review in *Nguyen*, Respondent would urge this Court to deny review in *Ahumada-Aguilar* and grant review only in *Nguyen* or defer consideration to allow other circuits

to address the issue.[1]

The third question presented -- whether the court of appeals had the power to declare Respondent to be a citizen of the United States, in the absence of a statute conferring citizenship -- is based on a mischaracterization of the relief granted by the Ninth Circuit. Declaring sections (a)(3) and (a)(4) of 8 U.S.C. § 1409 unconstitutional leaves the remainder of the statute intact. *See Miller v. Albright,* 523 U.S. 420 at 488-489 (1998) (Breyer, J., dissenting). In Mr. Ahumada-Aguilar's case, this means that the Government did not prove beyond a reasonable doubt an essential element of the crime of illegal reentry -- that Mr. Ahumada-Aguilar was an alien. The relief granted by the court of appeals was to reverse Mr. Ahumada-Aguilar's judgment and remand with "instructions to vacate the conviction." Moreover, because the Government's non-justiciability argument drew support from only two Justices in *Miller*, 523 U.S. at 455-456 (Scalia, with Thomas, JJ., concurring), review should be denied on this question.

STATEMENT

PROCEDURAL HISTORY

In 1995, the Government charged Mr. Ahumada-Aguilar by indictment with the crime of unlawful re-entry into the United States in violation of Title 8, United States Code

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[1] The Second Circuit has the same issue before it in *Lake v. Reno*, which was argued on March 31, 2000, and remains pending in that court (No. 99-4125).

section 1326. Mr. Ahumada-Aguilar moved to dismiss the indictment, claiming that because he had acquired United States citizenship at birth by virtue of his biological father's citizenship, the Government could not carry its burden of proving beyond a reasonable doubt that he was an "alien," an essential element of the charged crime. In the district court Mr. Ahumada-Aguilar argued that 8 U.S.C. § 1409(a) violated his deceased father's constitutional right to equal protection because it imposes burdens on a U.S. citizen father's ability to transmit citizenship to an out-of-wedlock child that do not apply to a U.S. citizen mother of an out-of-wedlock child.

The Government responded to the merits of Mr. Ahumada-Aguilar's equal protection argument but failed to raise any objection to Mr. Ahumada-Aguilar's standing to assert his father's constitutional right to equal protection. The Government's written and oral argument addressed the merits of Mr. Ahumada-Aguilar's equal protection claim without ever questioning or even mentioning any issue regarding his third party standing. The district court denied the pretrial motion to dismiss and further prohibited Mr. Ahumada-Aguilar from taking his citizenship defense to the jury. The court concluded that while Mr. Ahumada-Aguilar's biological father, Fred Deutenberg, was a U.S. citizen and met the five year residence requirement, Ahumada-Aguilar had not acquired citizenship because there was no evidence that Deutenberg had agreed in writing to provide financial support

for Ahumada-Aguilar or met any one of the three methods for conferring legitimation prior to Ahumada-Aguilar turning 18, as required by 8 U.S.C. §§ 1409(a)(3) and (4). The district court rejected Mr. Ahumada-Aguilar's equal protection challenge to the acquired citizenship statute.

Mr. Ahumada-Aguilar appealed, again challenging his conviction based on a violation of his father's right to equal protection. On May 23, 1996, the Government filed its appellee's brief in the Ninth Circuit Court of Appeals. Again the Government raised no objection to Mr. Ahumada-Aguilar's standing to assert his father's equal protection rights. On September 27, 1997 the Ninth Circuit issued its first decision, affirming the convictions and rejecting the equal protection argument based on *Ablang v. Reno*, 52 F.3d 801, 804-806 (9th Cir. 1995) and *Fiallo v. Bell*, 430 U.S. 787, 798-799 (1977). App. D to Pet. for Cert. Mr. Ahumada-Aguilar filed a petition for rehearing and requested a stay of proceedings because this Court had granted review in *Miller v. Christopher*, 96 F.3d 1467 (D.C. Cir. 1996), *cert. granted, Miller v. Albright*, 520 U.S. 1195, *and cert. limited*, 520 U.S. 1208 (1997). On November 13, 1997 the court of appeals stayed issuance of its mandate and further directed the parties to file simultaneous briefs within 30 days of the Supreme Court's decision in *Miller*, "addressing the effect" of that decision on the *Ahumada-Aguilar* appeal. App. C to Pet. for Cert.

On April 22, 1998 this Court issued its ruling in *Miller v. Albright*, 523 U.S. 420 (1998). Each opinion in the fragmented decision addressed or mentioned third party standing, with a majority of the Justices concluding that a child could raise the constitutional equal protection claim of the father under the circumstances present in *Miller*. *Miller*, 523 U.S. at 432-433 (Stevens, J., with Rehnquist, C.J., concurring there was standing); *id.* at 445-446 (O'Connor, J., with Kennedy, J., concurring in the judgment, concluding there was no standing); *id.* at 455 n.1 (Scalia, J., with Thomas, J., concurring in the judgment, accepting the petitioner's third party standing); *id.* at 460 (Ginsburg, J., with Souter, J. and Breyer, J., dissenting, concluding there was standing); *id.* at 473 (Breyer, J., with Souter, J. and Ginsburg, J., dissenting, concluding there was standing). On May 15, 1998 the Government filed its Supplemental Brief in *Ahumada-Aguilar*, discussing the impact of *Miller*. The Government's brief addressed the substantive equal protection issue but still failed to raise any objection to Mr. Ahumada-Aguilar's standing to raise his father's equal protection claim.

On July 22, 1998, in response to the Ninth Circuit's order directing the Government to file a response to Mr. Ahumada-Aguilar's Petition for Rehearing, the Government filed its third brief in the Ninth Circuit. The Government's brief again discussed the impact of this Court's decision in *Miller v. Albright, supra*, and again failed to raise any objection to Mr.

Ahumada-Aguilar's third party standing. On October 2, 1998 the court of appeals withdrew its first opinion, and on September 2, 1999, it issued its final decision reversing Mr. Ahumada-Aguilar's criminal convictions. App. A to Pet. for Cert.

In October, 1999, after four years of litigation concerning the equal protection rights of Ahumada-Aguilar's father, the Government filed a Petition for Rehearing and Petition for Rehearing En Banc in which, for the first time, it objected to the third party standing of Mr. Ahumada-Aguilar. The Ninth Circuit did not request a response by Ahumada-Aguilar. On December 22, 1999 the Ninth Circuit denied the Government's Petition for Rehearing and Rehearing En Banc without comment and without directing Mr. Ahumada-Aguilar to respond. App. F to Pet. for Cert.

FACTS[2]

Respondent's father, Frederick Deutenberg, a United States citizen by birth, met Respondent's mother, Genoveva Hernandez, a Mexican citizen, in December, 1970, at a restaurant in Nogales, Mexico. Deutenberg's two children,

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[2] The facts are contained in three uncontested affidavits filed in the district court along with a number of exhibits filed with the affidavits. Reproductions of the affidavits, but not the exhibits, are attached as follows:

Appendix A: Affidavit of Genoveva Hernandez. Appendix B: Affidavit of Federal Defender Investigator Lydia Serafin. Appendix C: Affidavit of Assistant Federal Public Defender Michael Filipovic.

Julie and Johnny, were with him. Deutenberg was seeking to hire someone to assist him to care for his children, who had been abandoned by their mother. He asked Ms. Hernandez to take the job and she agreed. Hernandez spent the first half of 1971 traveling with Deutenberg and his two young children throughout the United States. Deutenberg unsuccessfully attempted to find his children's mother during his travels with Hernandez. App. A pp. 2a-4a.

During the spring of 1971, Hernandez lived with Deutenberg in a furnished rental home in Hurst, Texas. At that time, Hernandez discovered she was pregnant with Deutenberg's baby. While Deutenberg became angry when she told him she was pregnant, he did not "send her packing" as suggested by both the Government's petition and the dissent of Ninth Circuit Judge Kleinfeld. Pet. for Cert. at p. 13; *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1129 (9th Cir. 1999) (Kleinfeld, J., dissenting). Instead, Deutenberg and Hernandez continued their travels together until Hernandez tired of their lifestyle and asked Deutenberg to let her go back home. He gave her $75 for a ticket back to Mexico and a suitcase. Before she left, Deutenberg vowed he would come find her and his expectant child. After leaving Deutenberg, Hernandez stayed in the United States for two more months before crossing the border back into Mexico in late summer of 1971. On December 22, 1971, Hernandez gave birth in Mexico to Deutenberg's son, Ricardo Ahumada-Aguilar, the Respondent in this case. App. A pp. 4a-5a.

Three months after the birth of Ricardo Ahumada-Aguilar, FBI agents visited Hernandez in Guadalajara, Mexico, looking for Deutenberg, who had become a fugitive in a pending federal criminal prosecution. The FBI agents told Hernandez they had her under surveillance because the FBI believed that Deutenberg was in Mexico looking for her. The FBI agents showed Ms. Hernandez a photograph which she identified as Deutenberg. At the agents' request Hernandez provided them with her only two photographs of Deutenberg, photographs taken during their travels in 1971. The FBI agents promised to return the photographs, but never did. App. A pp. 6a-7a.

Hernandez entered the United States in 1976, ultimately obtaining lawful permanent resident status. She assisted her son, Ricardo Ahumada-Aguilar, in obtaining lawful permanent residence as well. Over the years she made unsuccessful efforts to locate Frederick Deutenberg. App. A pp. 7a-8a.

Federal authorities apprehended Deutenberg and, upon conviction, he was sentenced in 1973 to a total of five years of imprisonment. Following his release from prison, Deutenberg lived in California from 1987 to 1994, where he died on April 17, 1994. App. B pp. 15a-16a; App. C pp. 19a-21a. Hernandez never succeeded in locating Deutenberg. Deutenberg, if he made any attempts to find Hernandez and Mr. Ahumada-Aguilar, was likewise unsuccessful.

REASONS FOR DENYING THE WRIT

1. Third Party Standing

Because Respondent has concededly suffered an "injury in fact," the Government is not challenging this Court's Article III jurisdiction.[3] The Government's challenge is directed instead to the prudential concerns this Court has in reviewing a claim based on third party standing. *See Hodel v. Irving*, 481 U.S. 704, 711 (1987) (discussing difference between Article III jurisdictional requirement of an "injury-in-fact" and "prudential standing limitations").

The Court should reject certiorari review of the Government's tardy third party standing objection because the "prudential objectives thought to be enhanced by restrictions on third party standing cannot be furthered here, where the lower court[s] [have] already . . . entertained the relevant constitutional challenge and the parties have sought or at least have never resisted an authoritative constitutional determination." *Craig v. Boren*, 429 U.S. 190, 193 (1976). The Government never raised standing in the district court. Moreover, even when specifically instructed by the Ninth Circuit to address the effect of this Court's decision in *Miller*

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[3] Mr. Ahumada-Aguilar's criminal conviction is the "injury in fact." *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Powers v. Ohio*, 499 U.S. 400 (1991). He also faces possible future prosecution for illegal reentry if he returns to the United States and thus has a separate recognized ground for demonstrating an "injury in fact." *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973).

v. Albright, supra, (a decision in which each of this Court's five written opinions mentioned or addressed the third party standing issue), the Government declined to challenge Mr. Ahumada-Aguilar's standing and instead sought a ruling on the merits. Only when the Ninth Circuit withdrew its opinion and ruled in favor of Ahumada-Aguilar, and found in the process of addressing the equal protection claim that Mr. Ahumada-Aguilar had third party standing, did the Government belatedly raise a third party standing concern in its petition for rehearing.

The Government waited until four years after the commencement of the equal protection litigation in this case to raise the standing issue. As this Court has stated under similar circumstances, "a decision . . . to forego consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be to impermissibly foster repetitive and time-consuming litigation under the guise of caution and prudence." *Craig v. Boren,* 429 U.S. at pp. 193-194.[4]

Moreover, this is not a case where this Court should exercise its discretion to decide an issue despite Petitioner's failure to preserve it. *Compare Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816, *reh'g denied,* 473 U.S. 925 (1985), (court

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[4] This is exactly what the Government seeks to do by asking for summary reversal of *Ahumada-Aguilar*; by arguing that reversal here would eliminate the circuit conflict with *Nguyen;* and finally, by suggesting certiorari review in *Nguyen* be denied. Pet. for Cert. p. 22.

considered issue where respondent failed to object, in its opposition to certiorari, to Petitioner's inclusion of an unpreserved claim and where the claim had been raised and fully briefed in the Court of Appeals without objection) *with City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 260 (1987) (court declined to consider issue where respondent strenuously objected to inclusion of the claim at the first available time after she was on notice that it was being raised).

Even if the Government had properly raised third party standing, it is not an issue worthy of certiorari review, and Petitioner offers no compelling reason for review. Indeed, the issue presents no circuit conflict. There is no claim that the lower courts have departed from the usual and accepted course of judicial proceedings or sanctioned such a departure as to call for this Court's exercise of its supervisory jurisdiction, and there is no claim of an important federal legal question. *See* Supreme Court Rule 10.[5]

Moreover, the Government treats Justice O'Connor's analysis of third party standing in her concurring opinion in

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[5] Although it does not specifically claim a circuit conflict on the standing question, the Government cites *Terrell v. INS*, 157 F.3d 806, 808-809 (10th Cir. 1998) for the proposition that where the citizen father was not a party and no "hindrance" was shown, there is no third party standing. Pet. for Cert. at p. 16. *Terrell* does not conflict with *Ahumada-Aguilar* because, as in *Miller*, Terrell's father was alive and able to pursue his equal protection claim.

Miller, in which Justice Kennedy joined, as the basis for its argument that this Court should review the third party standing issue. The Government ignores the fact that the other seven Justices did not concur with Justice O'Connor's standing analysis.[6]

Instead of articulating why the standing question deserves certiorari review under the standards set forth in Supreme Court Rule 10, Petitioner argues the merits of its third party standing objection. Suggesting that the Ninth Circuit misapplied the law, the Government asks this Court to summarily reverse on an issue it not only failed to raise in the district court but affirmatively disregarded in light of *Miller* in the court of appeals. Because Petitioner requests summary reversal, Respondent will address the merits of the third party standing issue to demonstrate that Mr. Ahumada-Aguilar does, in fact, have third party standing and that summary reversal on this ground is therefore not appropriate.

Mr. Ahumada-Aguilar successfully meets all three factors established by this Court to determine third party standing. To assert another's rights, a litigant must have suffered an

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[6] *See Miller v. Albright*, 523 U.S. at 432-433 (Stevens, J. with Rehnquist, Chief J.) (finding third party standing based on *Craig v. Boren*, 429 U.S. 190 (1976)); *id.* at 455 n. 1 (Scalia, J., with Thomas J., concurring, "accept[ing] Petitioner's third party standing"); *id.* at 460 (Ginsburg, J. with Souter J. and Breyer J., dissenting, concluding there was standing); *id.* at 473 (Breyer, J. with Souter and Ginsburg J., dissenting, concluding there was standing).

injury in fact, should have a close relation to the third party, and there should be some hindrance to the third party's ability to promote his or her own rights.[7] *See Powers v. Ohio*, 499 U.S. 400, 410-411 (1991); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989).

Mr. Ahumada-Aguilar's criminal conviction and the risk of future prosecution if he reenters the United States establishes an "injury in fact." Additionally, this Court has also recognized the denial of citizenship as a sufficient injury to justify third party standing. *See Miller*, 523 U.S. at 432-44 (Stevens, J., with Rehnquist, Chief J.); *id.* at 447 (O'Connor, J., with Kennedy, J., concurring); *id.* at 473 (Breyer, J., with Souter, J. and Ginsburg, J., concurring).

While the Government does not contest Respondent's "injury in fact," it erroneously claims Mr. Ahumada-Aguilar has failed to meet the close relation and hindrance factors.

Attempting to deprecate Respondent's relation with his father by characterizing it as as "only genetic", and by focusing on the actual relationship between Ahumada-Aguilar and his father, Petitioner ignores this Court's broad interpretation of "close relation." *Campbell v. Louisiana*, 523

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[7] In making the prudential inquiry, the court looks at a number of factors, but does not require that each factor must weigh in favor of review to grant third party standing. *See Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (third party standing proper where two of three factors weighed in favor of Petitioner, but a third factor counseled against review).

U.S. 392, 398 (1998). To the contrary, a sufficiently close relation exists between Mr. Ahumada-Aguilar and his father to establish third party standing. Broadly interpreting the term "close relation," the Supreme Court has granted standing where the litigant and third party share a "common interest" in the assertion of their rights, and the litigant possesses an incentive to effectively advance the claim. *Campbell*, 523 U.S. at 398; *Powers*, 499 U.S. at 413-414. In both *Campbell* and *Powers*, this Court granted white criminal defendants third party standing to assert the rights of African-Americans excluded from jury service due to their race. *Campbell*, 523 U.S. at 400; *Powers* at 499 U.S. at 415. The defendants and the excluded jurors possessed a close relation because they "share[d] a common interest in eliminating discrimination, and the criminal defendant[s] ha[d] an incentive to serve as . . . effective advocate[s] because a victory may result in overturning [their] conviction[s]." *Campbell*, 523 U.S. at 398; *Powers*, 499 U.S. at 413-414; *also see Craig v. Boren*, 429 U.S. 190 (1976) (vendor and 18-20 years male purchasers of beer); *Caplin*, 491 U.S. at 623 n.3 (attorney and attorney's clients whose assets were to be forfeited and thus unavailable to pay attorney).

In this case, both father and son "share a common interest in eliminating [such] discrimination. . . ." *Campbell*, 523 U.S. at 398. Frederick Deutenberg's ability to confer citizenship to his son has been curtailed by arbitrary gender based discrimination in violation of his right to equal

protection. Respondent has been denied United States citizenship based upon that discrimination, and therefore has an even greater incentive to aggressively advocate his father's claim. Moreover, like the defendants in *Campbell* and *Powers*, if Mr. Ahumada-Aguilar prevails, his criminal conviction will be reversed.

While Petitioner focuses upon whether *individual* right holders would in fact have wanted to assert their rights, this Court did not find such an issue relevant when determining the presence of a close relation for purposes of third party standing. *See Campbell*, 523 U.S. at 397-398;[8] *Powers*, 499 U.S. at 413-415. The existence of a common interest, coupled with an incentive to effectively advocate the right holder's claim, sufficiently establishes a relation in which the litigant "is fully, or very nearly, as effective a proponent of the right as the [third party]." *Powers*, 499 U.S. at 413 (quoting *Singleton v. Wulf*, 428 U.S. 106, 115 (1976)). The only Supreme Court authority Petitioner refers to in support of its argument that the "close relation" prong of third party standing is not met where individual right holders *may* not wish to protect their rights, involves a third party *expressly* opposing the litigant's attempt to gain standing. *See Gilmore v. Utah*, 429 U.S. 1012, 1013-14 (1976) (Burger, C.J., with whom Powell, J., joins, concurring) (denying third party

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[8] In *Campbell*, this Court implicitly rejected such a narrow focus, which Justice Thomas had advanced in his dissent. *See Campbell*, 523 U.S. at 405-406 (Thomas, J., dissenting).

standing where death sentenced prisoner strenuously objected to his mother's attempt to stop his execution by asserting his rights). The instant case presents no evidence of such rejection.[9]

Mr. Ahumada-Aguilar, having established the "injury in fact" and the "close relation," components of third party standing, has also demonstrated that Frederick Deutenberg faced a hindrance preventing him from advancing his own claim. Frederick Deutenberg is dead, having passed away before Mr. Ahumada-Aguilar, through his counsel, could discover his location. Both this Court and the Ninth Circuit

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[9] Even if one considers the close relation factor to be a subjective test of the right holder's wishes, contrary to this Court's recent decisions, the Government's analysis is based on a faulty factual assumption grounded in a gender stereotype. The Government argues that Deutenberg would have had no desire to confer citizenship on his out-of-wedlock son because the only connection between Mr. Ahumada-Aguilar and his father is biological. However, the record establishes Frederick Deutenberg was a concerned single parent of two children (whose mother had abandoned them) and that he hired Genoveva Hernandez to be their nanny. When Genoveva became pregnant, Frederick initially became angry, but he did not "sen[d] the mother packing" as erroneously suggested by the Government in its petition. Pet. for Cert. at p. 13. In fact, Deutenberg and Hernandez remained together for some time thereafter until she asked him to let her go home. Deutenberg acquiesced, giving her $75 for a bus ticket and a suitcase. Finally, contrary to the Government's claim of disinterest, Deutenberg vowed he would come find Genoveva Hernandez and his expectant child. *See* Appendix A, pp. 2a-5a.

have held the death of the third party to be an effective hindrance. *See Hodel v. Irving*, 481 U.S. at 711-712 (granting third party standing to heirs or devisees of deceased holders of fractional interests in Indian trust lands); *Wauchope v. United States Department of State*, 985 F.2d 1407, 1411 (9th Cir. 1993) (granting child standing to assert deceased mother's equal protection right in an acquired citizenship context); *see also Miller v. Albright*, 523 U.S. at 449 (O'Connor, J., concurring) (describing death of the third party as an "extreme example" of hindrance).

Nonetheless, and without citation to any authority, Petitioner invents a two factor test for hindrance when the right holder is deceased. Pet. for Cert. at p. 12. The Government claims this Court must consider what opportunity the third party had to assert the right before his death, and the likelihood the third party would have wanted to assert it.[10] *Id.* Petitioner's test directly contradicts this Court's broad application of the prudential rule of third party standing in circumstances where the third party would clearly be an effective advocate of the constitutional claim. *See*

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[10] Although the Government suggests that the right holder's opportunity to assert the claim before death should be considered, this Court did not consider such circumstances relevant in *Hodel*, even though it is apparent from the facts in that case that the third parties had that opportunity. *See Hodel*, 481 U.S. at 709, 711-712. Moreover, the Government's test is profoundly impractical as it requires an inquiry into the personal motivations of a dead person.

Campbell, 523 U.S. at 397-398 (white criminal defendant and African-American grand jury foreman); *Powers*, 499 U.S. at 410-15 (white criminal defendant and African-American petit juror); *Caplin*, 491 U.S. at 623 n.3 (attorney and clients whose funds will be forfeited and thus unavailable for attorney fees); *Craig*, 429 U.S. at 192-97, (beer vendor and 18-to-20-year old males who wish to purchase beer). Moreover, accurately assessing a decedent's subjective wishes prior to death would be an overly burdensome and difficult, if not impossible, task. In light of established Supreme Court precedent and the obvious impracticality of Petitioner's test, neither factor of the Government's proposed test need be addressed.[11]

The Government's request that this Court summarily reverse the Ninth Circuit on this third party standing issue is not appropriate where the Government bases its request upon

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[11] Even under the Government's two part analysis, Mr. Ahumada-Aguilar has demonstrated his ability to assert his father's claim. The uncontested evidence in the record establishes that Deutenberg was significantly hindered in his ability to find his son by his imprisonment, by the limits on his travel which necessarily flowed from his post-sentence supervision, Genoveva Hernandez's subsequent travels from her homeland, and her lack of documentation in the United States until 1985. App. A pp. 8a-9a; App. B pp. 19a-21a. One could also conclude from this record that Deutenberg likely would have asserted his equal protection rights had he found Respondent. *See supra* note 9.

an invented test not grounded in this Court's -- or, indeed, any court's -- precedent and where the Government posits this test for the first time before this Court, having failed to timely raise any third party standing issue in the courts below. Moreover, certiorari review should not be granted on this issue because Petitioner has not advanced any compelling arguments why this issue justifies review by this Court. Finally, Respondent satisfies the substantive requirements of third party standing.

2. Equal Protection

Certiorari review should be denied in Mr. Ahumada-Aguilar's case because each of the circuits that have addressed the equal protection issue after *Miller* have applied a heightened scrutiny analysis, because the Ninth and Third Circuits correctly concluded that, after *Miller*, gender based distinctions for transmission of citizenship do not pass heightened scrutiny analysis, and because five of the Justices of this Court agree that any such gender classifications based on stereotypes are unlikely to or do not survive heightened scrutiny. *Miller v. Albright,* 523 U.S. at 451-452 (O'Connor, J., with Kennedy J., concurring); *id.* at 460 (Ginsburg, J., with Souter J., and Breyer J., dissenting); *id.* at 472 (Breyer, J., with Souter, J. and Ginsburg J., dissenting).

Following this Court's decision in *Miller v. Albright*, the Third, Fifth and Ninth Circuits each held that heightened scrutiny must be applied to gender-based distinctions in citizenship statutes. *See United States v. Ahumada-Aguilar,*

supra (addressing constitutional validity of 8 U.S.C. §§ 1409(a)(3) and (4)); *Nguyen v. Immigration and Naturalization Service, supra* (addressing the constitutionality of 8 U.S.C. § 1409(a)(4)); *Breyer v. Meissner,* No. 98-1842, 2000 WL 727508, at *8-*9 (3d Cir. June 6, 2000) (finding acquired citizenship statute applicable to foreign born children born before 1934 unconstitutional under a heightened level of scrutiny). The issue is presently pending before the Second Circuit. *Lake v. Reno,* No. 99-4125 (2d Cir. argued March 31, 2000) (presenting the equal protection issue with respect to 8 U.S.C. § 1409(a)). The Third and the Ninth Circuits have further concluded that the gender based distinctions of the relevant statutes do not pass heightened scrutiny analysis, while the Fifth Circuit concluded that 8 U.S.C. § 1409(a)(4) passes muster under a heightened scrutiny analysis. Thus, the circuit conflict does not involve the broad question of whether heightened scrutiny analysis is required after *Miller*, but, rather, the narrow question of whether citizenship statutes with different requirements for transmission of citizenship based on the gender of the parent survive this heightened scrutiny analysis.

The Third, Fifth and Ninth Circuits are all correct in analyzing the various opinions of this Court in *Miller v. Albright, supra,* and concluding that the heightened scrutiny standard should be applied. In *Nguyen v. Immigration and Naturalization Service, supra,* the court rejected the Government's argument that *Fiallo v. Bell,* 430 U.S. 787

(1977) controlled the equal protection analysis of 8 U.S.C. § 1409 and "decline[d] to adopt the *Fiallo* 'facially legitimate and bona fide reason' standard." 208 F.3d at 535.

In *Breyer v. Meissner*, the court analyzed the various opinions in *Miller* and concluded that "[b]ecause the case before us also involves a third party claim derived from the rights of the American citizen mother and because the mother can no longer assert her rights herself, we conclude that a heightened level of scrutiny should apply here." 2000 WL 727508, at *8. Unlike *Nguyen*, the *Breyer* court went on to find that the Government had not demonstrated an "exceedingly persuasive justification" for the gender classification as required by *United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* At *8-*9.

In *Ahumada-Aguilar*, the majority also analyzed the various opinions in *Miller v. Albright* and reached the same result: that a majority of this Court either concluded or were likely to conclude that heightened scrutiny should apply and that 8 U.S.C. § 1409(a) would not withstand such scrutiny. The Ninth Circuit majority, relying on Justice O'Connor's concurring opinion, quoted Justice Breyer's dissent:

> [L]ike Justice O'Connor, I "do not share," and thus I believe a Court majority does not share, "Justice Stevens' assessment that the provision withstands heightened scrutiny." I also agree with Justice O'Connor that "[i]t is unlikely" that "gender classifications based on stereotypes can survive heightened scrutiny," a view shared by at least five members of this Court.

Ahumada-Aguilar, 189 F.3d at 1126 (quoting *Miller v.*

Albright, 523 U.S. at 476 (Breyer, J., dissenting)).

If the Third and Ninth Circuits' interpretation of *Miller v. Albright* and Justice Breyer's analysis are correct, then review should be denied in *Ahumada-Aguilar*. If this Court wishes to clarify *Miller*, the Court should consider review in *Nguyen v. Immigration and Naturalization Service* to reverse that court on the narrow issue for which there is a conflict, i.e., has the Government established an "exceedingly persuasive justification" for the gender distinction in 8 U.S.C. § 1409(a).[12]

The Ninth Circuit decision in *Ahumada-Aguilar* is well grounded in this Court's precedent which has repeatedly criticized and found unconstitutional statutes or regulations based on stereotypical assumptions. *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions"); *Duren v. Missouri*, 439 U.S. 357, 369 (1979) (state's practice of excluding women from jury venire violated equal protection where it was justified only by stereotype of "safeguarding the important role played by women in home and family life"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S.

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[12] Of course, the Court can also defer consideration of this equal protection issue until the Second Circuit or other circuits have weighed in on this question, or grant summary reversal in *Nguyen* on the strength of Justice O'Connor's concurring opinion along with the dissenting opinions.

127, 130-131 (1994) (reaffirming what should be axiomatic, i.e., "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women"). These principles were so embedded in Supreme Court case law that the Solicitor General declined to seek certiorari review in *Wauchope v. United States Department of State*, 985 F.2d 1407, 1416 (9th Cir. 1993), where the court held that a pre-1934 statute granting citizenship to foreign born children of U.S. citizen fathers, but not the foreign born children of U.S. citizen mothers, violated equal protection applying rational basis analysis.[13] *See Miller v. Christopher*, 96 F.3d 1467, 1475 n.3 (D.C. Cir. 1996) (citing to speech given by former Solicitor General Drew S. Days, in which he explained that he was convinced that the decision in *Wauchope* was "consistent with modern developments in the Supreme Court's jurisprudence concerning statutory distinctions based on gender").

These principles were reiterated in *United States v. Virginia*, when this Court stated that any Government justification for official action that distinguishes between men and women "must not rely on overbroad generalizations about

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[13] This is the same citizenship statute which was found to violate equal protection under a heightened scrutiny analysis in *Breyer v. Meissner*, No. 98-1842, 2000 WL 727508, at *8-*9 (3d Cir. June 6, 2000).

the different talents, capacities or preferences of males and females." 518 U.S. at 533 (1996). This view is echoed by Justice O'Connor in her concurring opinion in *Miller*, when she observed that "[i]t is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny . . . ." 523 U.S. at 452.

Finally, while the equal protection violation here promotes gender discrimination against the male father, the historical roots of the present statutory scheme are planted in a common law tradition which is highly discriminatory against mothers. *Miller,* 523 U.S. at 460-471 (Ginsburg, J., dissenting); Kristin Collins, Note, *When Fathers' Rights are Mothers' Duties; The Failure of Equal Protection in Miller v. Albright*, 109 Yale L.J. 1669 (2000). An examination of the historical basis for the gender distinctions in section 1409(a) reveals a policy of financially protecting the father of out-of-wedlock children at the expense of the mother, who is left with the responsibility of raising and supporting the out-of-wedlock child. This derived from the nineteenth century principle of coverture, in which men had full legal rights and responsibilities regarding children born in marriage, while women had full legal rights and responsibilities regarding children born out of marriage. *Collins,* 109 Yale L.J. at 1672. Thus, 8 U.S.C. § 1409(a) has a discriminatory impact on both present day fathers, whose right to transmit citizenship is burdened, and on mothers, who are expected to bear the legal and financial brunt of out-of-wedlock children. In either case,

there is no "exceedingly persuasive justification" for the gender based distinction of the statute.

3. Court's Power to Remedy the Equal Protection Violation

Based on Justice Scalia's concurring opinion in *Miller v. Albright*, *supra*, and this Court's decision in *INS v. Pangilinan*, 486 U.S. 875 (1988), *reh'g denied*, 487 U.S. 1264 (1988), the Government argues, in essence, that the equal protection claim is non-justiciable because the Court is powerless to remedy any gender discrimination in Title 8, U.S.C. § 1409(a). However, the remedy is well within the Court's power because it simply requires following Congress' own specific statutory directions and long-accepted principles of judicial remedial action, of which Congress was well aware. The appropriate remedy -- explicitly required by the INA -- is to sever the offending provisions of section 1409(a) challenged here. *See* Immigration and Nationality Act of 1952, ch. 477, tit. IV, § 406, 66 Stat. 166 ("If any particular provisions of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act. . . shall not be affected thereby.") (codified at 8 U.S.C. § 1101 note (Separability Provisions)); *Miller*, 523 U.S. at 488-489 (Breyer, J., dissenting). The remaining gender specific provisions of section 1409(c), which currently govern mothers, should then be "extend[ed] . . . to include those who are aggrieved by the exclusion," namely citizen fathers. *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (quotation

omitted); *see Wauchope v. United States Department of State*, 985 F.2d at 1418 (court has power to redress citizenship statute's unconstitutional gender discrimination by extending to citizen mothers same right to transmit citizenship as possessed by citizen fathers under the statute). This approach is consistent with decades of equal protection cases, in which this Court has consistently remedied equal protection violations by extending, rather than restricting, protections.[14] *See, e.g., Califano v. Westcott*, 443 U.S. 76, 89-91 (1979); *Silbowitz v. Secretary of Health, Education, and Welfare*, 397 F.Supp. 862 (S.D. Fla. 1975), *aff'd*, 430 U.S. 924 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974); *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973); *Frontiero v. Richardson*, 411 U.S. 677 (1973); and *Richardson v. Griffin*, 409 U.S. 1069 (1972).

By striking sub-sections (a)(3) and (a)(4), Mr. Ahumada-Aguilar would acquire citizenship through the remaining provisions of section 1409(a) and the five-year residency requirement of section 1401(g). While the distinction between the five-year residency requirement in section 1401(g) and the one-year requirement for mothers of out-of-

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[14] Of course Congress would be free to redraft the rules for out-of-wedlock children acquiring citizenship from their U.S. citizen parents, but would have to do so in a gender neutral fashion. *See Craig v. Boren*, 429 U.S. 190, 210 n. 24 (1976).

wedlock children in section 1409(c) may create a further equal protection problem, it is not an issue presented by the facts of this case where Ahumada-Aguilar's father meets both tests.

In striking the offending sex-based provisions and extending section 1409(c) or invoking the remainder of section 1409(a) and 1401(g), the court of appeals did not "grant" citizenship, but merely applied the statutory scheme that does. *See Miller*, 523 U.S. at 488-89 (Breyer, J., dissenting) (noting that the Court need not grant citizenship, because the statute itself does). *INS v. Pangilinan*, 486 U.S. 875 (1988), is not to the contrary. Rather than challenging the constitutionality of any provision, the litigants there asked the Court to confer citizenship as an equitable remedy. *Pangilinan*, 486 U.S. at 882-883. It was this claim that was rejected by the Court, since it would arguably circumvent the "legislative will" of Congress. *Id.* at 884. Here, however, the "legislative will" would be served, first by severing the unconstitutional provisions of § 1409(a) in accordance with the legislative mandate as to separability, and then by applying the remaining statutory provision, § 1409(c), in a gender-neutral manner or by applying the remainder of §1409(a) along with § 1401(g).

Moreover, the Government mischaracterizes the remedy provided in this case as the Ninth Circuit Court conferring citizenship on Mr. Ahumada-Aguilar. In fact, the Court's declaration that subsections (a)(3) and (a)(4) were

unconstitutional simply leaves the remainder of the statute intact. In Mr. Ahumada-Aguilar's case, this meant that the Government had not proved that he is an alien, an essential element of the crime for which he was convicted, because there is a reasonable doubt concerning his status. Therefore, the Ninth Circuit correctly reversed the judgment with instructions to the district court that the conviction be vacated. 189 F3d at 1127. Accordingly, any argument that limitations on the Court's remedial powers render the instant case non-justiciable, and therefore appropriate for certiorari, should be rejected out-of-hand.

CONCLUSION

For these reasons, review should be denied as to each of the questions presented, and the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Thomas W. Hillier, II
Federal Public Defender
for the Western District of Washington

Jay W. Stansell
Assistant Federal Public Defender

Michael Filipovic
Assistant Federal Public Defender
Counsel of Record

JULY 2000

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,	)	NO.CR95-339Z
	)	
Plaintiff,	)	AFFIDAVIT
	)	OF
vs.	)	GENOVEVA
	)	HERNANDEZ
RICARDO AHUMADA-AGUILAR,	)	
	)	
Defendant.	)	
	)	

STATE OF WASHINGTON	)	
	)	ss.
COUNTY OF KING	)	
	)	

I, Genoveva Hernandez, being first duly sworn and upon my oath, depose and say:

1. I am the mother of Ricardo Ahumada-Aguilar, the defendant in this case. I was born on the 7th day of December, 1951, in Chapalilla, Nayarit, Mexico.

2. I am presently living in the United States in Mt. Vernon, Washington, and I am employed as a cook. I have lived in the United States since 1976.

3. My son, Ricardo, was born on December 22, 1971.

4. His father was Frederick Deutenberg, who was also known to me as Fred Door.

5. I grew up in Nayarit, Mexico, which is where most of my family is from. In 1968, at age 16, I moved to Guadalajara, where I worked as a live-in housekeeper for the family which owned the Coca-Cola Bottling Company in Guadalajara. In late 1970 to very early in 1971, I moved to Nogales, Mexico, to live with my cousin and to find a job. I had a son, Alejandro, who was 6 to 7 months old at that time. Alejandro was sick, I was running out of money, and I was desperate to find a reasonable source of income for myself and my son Alejandro. It was at this time, during the last week of December, 1970, that I met Fred Deutenberg in a restaurant in Nogales, Mexico. With Fred was a man named Frank, a second man named Daniel and two small children, Julie and Johnnie. Fred Deutenberg told me that the mother of his children had left and that he needed someone to care for his children in the United States. He told me that he owned a ranch and that he wished to hire me to care for his children. Mr. Deutenberg appeared to be in his late 40s when I met him. Based on his appearance, I believed that he was telling me the truth. He told me that if I came to work for him, he had friends in Nogales who could arrange to have me enter the United States to work for him.

6. From January through approximately June, 1971, I traveled with Fred Deutenberg. We began this journey in Tucson, Arizona, where we stayed in a hotel for

three days. Initially, we travelled in three automobiles and pulled a U-Haul. In addition, to Fred Deutenberg, there were two other men, "Daniel" and "Frank", who I was introduced to. Also traveling with us were Fred's two young children, John and Julie, and my son Alejandro. Frank was with us for only a few days of this journey. Later, Daniel picked up a female hitchhiker by the name of Gwen who joined us and became his girlfriend. Several weeks later, Daniel also left and the only people left were myself, Frederick Deutenberg, his two children and my son Alejandro.

7. Shortly after I agreed to work for Deutenberg, I learned that I had been naive and had been lied to. During my travels with Deutenberg, he used a number of false identification documents. He would leave hotels and motels without paying for the charges, would steal items from the hotels, and would even steal U-Haul trailers from other automobiles parked in the same parking lots of the motels in which we stayed. During much of this time with Fred Deutenberg, I felt trapped. I was very young, I did not speak English well at that time, and I was fearful once I observed all of his criminal activity.

8. We traveled through many states. From Tucson, we went to Phoenix, Arizona, after Mr. Deutenberg had us pack up in the middle of the night and leave. From Phoenix, we went back to Tucson for one day and then traveled to Fort Worth, Texas. Before leaving for Texas, we met one of Deutenberg's adult daughters who was staying in a hotel with

two small children.

9. Fred attempted to find the mother of his children by stopping at her parents' home in Fort Worth, Texas. Her parents called the police and I was left with the impression that the mother of Fred's two children did not wish to see him and was running from him. For approximately one month, we stayed in a furnished home in Hurst, Texas, which Deutenberg told me he was renting with an option to purchase. While living in Hurst, Texas, I learned that I was pregnant. When I told Deutenberg I was pregnant, he became angry and I was afraid. After one month, he did not pay the rent, then stole the furniture from the house, painted the U-Haul trailer and put stolen license plates on the vehicle and we left Texas. From Texas, we traveled to Louisville, Kentucky, and Deutenberg showed me a house which he claimed he had owned. From Louisville, Kentucky, we traveled to Cincinnati, Ohio, and then on to Mobile, Alabama. In most places, we stayed in hotels. In every place we went, Fred Deutenberg had acquaintances and many of them appeared to be in the race track or horse business. It was about this time that "Daniel" left us, leaving behind Gwen, the woman whom we had picked up hitchhiking. Deutenberg then told Daniel's girlfriend Gwen that she had to leave, and the following morning, Fred Deutenberg and I, along with the children, traveled to Philadelphia, Pennsylvania, and spent Easter with his mother and his mother's boyfriend. I also recall driving near to the Canadian border and through the

cities of Indianapolis, St. Louis, and Tulsa. While in Tulsa, Oklahoma, Fred ran out of money and he contacted his brother, Johnny Deutenberg, for funds. Later, we traveled to Amarillo, Texas, where we stayed for one week. We then traveled to Heifer, Texas. I told Deutenberg that I could no longer travel like this and that when I had an opportunity, I would run away. Deutenberg then began to work at a regular job on a construction site and used his real name. This lasted for only about two to three weeks. I kept telling Fred that I could not stay with him and asked him to let me go. Finally, after he was paid, he gave me $75 for a ticket back to Mexico and a small suitcase. Before I left, Deutenberg vowed that he would come find me and his child. I left Fred Deutenberg at that time, but stayed in Texas for two more months before returning across the border to Mexico in the late summer of 1971.

10. On December 22, 1971, I gave birth to my son, Ricardo, who is the defendant in this case. The pregnancy was a full-term pregnancy.

11. Mr. Frederick Deutenberg is the father of Ricardo because he is the only person with whom I had sexual relations in 1971.

12. Ricardo was born in Guadalajara, Mexico. When Ricardo was approximately three months old, I was working as a housekeeper for an engineer. Two men came to the house where I was working and identified themselves as U.S. FBI agents. They spoke to me in Spanish. I had Ricardo

with me and one of the agents asked me "this is Fred's son?" I acknowledged that Ricardo was his son. I spoke with the two agents for about fifteen minutes and then agreed to meet with them the next day at an office in Guadalajara. I recall the name of the first agent as Julio or Luis Limon, but I do not know the correct spelling of his name, and I do not recall the name of the second agent. They showed me a picture of Fred Deutenberg with numbers across his chest. They also had many different names for him.

13. The next day, we met at the agents' office and they interviewed me for two to three hours. Agent Limon took notes, we reviewed maps and I told him about my experiences with Fred Deutenberg. I also had two photographs of Fred Deutenberg which I gave to the FBI agents at their request. The agent promised to return these photographs to me.

14. The FBI agents told me that they had me under surveillance because they believed that Fred Deutenberg was in Mexico looking for me. They told me that they believed he was dangerous and that they were investigating him for a number of different crimes, including fraud, narcotics, robbery and several murders. I later learned that the FBI agent had found me in Mexico by tracking me through three of my previous employers in Mexico. Prior to moving to Nogales, Mexico, and prior to meeting Fred Deutenberg, I had worked for the owner of the Coca-Cola factory as a housekeeper in Guadalajara, Mexico. During my time with

Fred Deutenberg and "Daniel", I had shared this information along with a number of other facts about my past with both Fred and "Daniel". I now believe that the FBI was able to find me in Mexico because "Daniel", who I recently learned is Daniel Hanna, provided them with this information about my past.

15. Approximately three months after my first two contacts with this FBI agent, I went back to find FBI Agent Limon. I recall that in the meantime his office had moved and I found him at a different location. He had previously promised that he would return the photographs of Fred Deutenberg to me. These were the only photographs of my son's father and I wished to have them returned to me. The FBI agent advised me that he had sent the photographs to the United States. When I reminded him of his promise to return them to me, he apologized. He informed me that in the meantime, Frederick Deutenberg had been arrested. It is my memory that he told me that the arrest took place in either Las Vegas or Reno, Nevada.

16. In late 1972 or early 1973, I went to the embassy or consulate in Guadalajara, Mexico, and attempted to get help in finding Fred Deutenberg. They were unable to help me. All I could do was look through phone books they had for the towns where I had met his family. I looked in the Pennsylvania phone books and the Forth Worth, Texas, phone books, but I was never able to actually find Fred. One of the problems I faced was I simply did not know how to spell his

last name.

17. Over the years, I made additional attempts to track down Ricardo's father. I arrived in the United States in 1976. I would look in phone books in cities that I traveled through to see if I could find a Deutenberg, but was unsuccessful. In 1985, I obtained legal status in this country based on my marriage to a U.S. citizen. I made a further attempt to locate Ricardo's father when Ricardo had begun to experience emotional problems concerning the identity of his father. I had told Ricardo about who his father was but he always doubted the truth of my story. He experienced problems at school and the counselors told me that he was having difficulties with the question of his identity and the identity of his father. I again tried to locate Fred Deutenberg by contacting the FBI office in Oakland, California, and they would not help me without a court order.

18. I lived in the state of California from approximately 1976 to 1992. I lived in Oakland, California, from 1976 to 1986, and in Visalia, California, from 1986 through 1992. In 1992, I moved to Mt. Vernon, Washington, where I currently reside. My son, Ricardo, lived with me in California and later moved with me to Mt. Vernon, Washington.

19. I assisted my son Ricardo in obtaining his "green card" in 1985. He was admitted under an immigrant visa and alien registration on September 7, 1985. We applied for permanent resident alien status for Ricardo, who was 13 years

old at the time. At that point in time, I did not make a request to declare Ricardo a citizen because I did not understand the law concerning citizenship and because the person who assisted me in preparing the request for permanent resident alien status advised that it would be simpler to request that Ricardo be declared a permanent resident alien based on his relationship to me.

20. After leaving Fred Deutenberg, prior to the birth of my son, Ricardo, I had no further contact with Fred Deutenberg and did not know where or how to find him. I made several attempts to locate Fred Deutenberg, but was unsuccessful. I felt that it would have been important for my son, Ricardo, to find his real father. I also was attempting to look for Fred so that I could ask him or later require him to provide financial support for Ricardo.

21. In November, 1986, my husband became sick and unable to work. I then obtained public assistance for food stamps and medical coupons. My son Ricardo was part of this grant. During the application process, I told them that Fred Deutenberg was his father, but that I had no idea where he was.

22. It was only through the work of Ricardo's attorney and investigator that I have now learned of what became of Fred Deutenberg and the fact that he is now recently deceased.

The foregoing is true and correct to the best of my belief and knowledge.

DATED this 17 day of August, 1995.

/S/
Genoveva Hernandez

SUBSCRIBED AND SWORN to before me this 17th day of August, 1995.

/S/
NOTARY PUBLIC in and for the State of Washington, residing at Seattle, Wa.
My appointment expires 8-9-96

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, vs. RICARDO AHUMADA-AGUILAR, Defendant.	NO.CR95-339Z AFFIDAVIT OF FEDERAL PUBLIC DEFENDER INVESTIGATOR LYDIA SERAFIN

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, Lydia Serafin, being first duly sworn and upon my oath, depose and say:

1. I am an investigator employed with the Federal Public Defender's Office for the Western District of Washington.

2. I was assigned to conduct the defense investigation in the above-captioned case.

3. I was assigned the task of attempting to locate Mr. Frederick Deutenberg, also known as Fred Door, in order

to corroborate Genoveva Hernandez's statement to us that Mr. Deutenberg was her son Ricardo Ahumada-Aguilar's father and that she believed Frederick Deutenberg was a United States citizen. Unfortunately, Ms. Hernandez did not know how to spell Mr. Deutenberg's last name and had no contact with Mr. Deutenberg after 1971.

4. Our first interview of Genoveva Hernandez took place by telephone on the afternoon of April 10, 1995, the same day as Mr. Ahumada-Aguilar's first appearance in federal court. On April 13, 1995, a WESTLAW search was conducted under miscellaneous spellings for the somewhat unusual name of Deutenberg. It was hoped that due to Ms. Hernandez's belief that Mr. Deutenberg had a history of criminal activity and that he had been ultimately arrested as a fugitive, his name might appear in a published court opinion. The name "Fred J. Door", also known as "Fred J. Dutenberg", appeared in a federal district court opinion in United States v. Daniel Hanna, 347 F.Supp. 1010 (D. Del. 1972).[1] The discovery of this opinion substantially corroborated Ms. Hernandez's statement concerning the existence of Mr. Deutenberg. First, in the April 10, 1995, telephone interview of Ms. Hernandez, she gave us both the name Frederick Deutenberg and the name Fred Door which

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[1] The opinion spells the last name "Dutenberg". However, subsequent investigation established the correct spelling as "Deutenberg".

appeared in the opinion. Secondly, the facts in the opinion are consistent with the chronology given to us by Genoveva Hernandez. The Hanna opinion states that Mr. Daniel Hanna was arrested on April 13, 1971, and questioned by government agents who promised that he would not be prosecuted for a 1970 offense if he gave information implicating Fred J. Door a/k/a "Fred J. Dutenberg". The opinion further notes that was Hanna released on April 13, 1971, and then questioned several times by government agents about testifying against Mr. Deutenberg. In December of 1971, Mr. Hanna traveled to Baltimore, Maryland, to confer with the United States Attorney and a few weeks later again traveled to Baltimore to testify, but then discovered that Deutenberg had jumped bail. 347 F.Supp. at 1013 fn. 3. These facts were fully consistent with Ms. Hernandez's statement that she was contacted by FBI agents in Mexico approximately three months after the December 22, 1971, birth of Ricardo Ahumada-Aguilar, and that these agents were looking for Fred Deutenberg, who was also known as Fred Door.

5. Based on this information, I attempted to locate Fred Deutenberg by obtaining the court records from his federal prosecutions in the District of Maryland. While these documents established that Mr. Deutenberg was ultimately arrested in June, 1972, prosecuted and ultimately sentenced to a total of three years imprisonment, they shed no light on his present location. (This further corroborated Ms.

Hernandez's statements to us that when she returned to the FBI several months later to retrieve her photographs of Mr. Deutenberg, the agent advised her that he had been apprehended). Subsequent attempts to locate Mr. Deutenberg through the Bureau of Prisons also proved fruitless. At first, the Bureau of Prisons claimed that they never had a Fred Deutenberg a/k/a Fred Door in their custody, despite our providing them with copies of court documents showing that he had been committed to the Bureau of Prisons. Eventually, the Bureau of Prisons' inmate locator service in Washington, D.C., acknowledged that he had been incarcerated at the Lewisburg federal prison in Pennsylvania and also at the Springfield, Missouri federal prison.

6. Attempts by attorney Michael Filipovic to obtain copies of all presentence reports for Mr. Deutenberg proved fruitless because they had all been destroyed due to the age of the case.

7. On about June 6, 1995, I obtained a list of individuals with the last name of Deutenberg who had telephone numbers in the United States. I telephoned the names on this list with the hope that one of these individuals might be related to Mr. Deutenberg. As a result of this effort, I spoke with a Mr. John Deutenberg from Apache Junction, Arizona, who stated that he was the brother of Fred Deutenberg and that Fred had died in 1994. (In our first telephone interview of Genoveva Hernandez, she told us that Fred had a brother named John who lived in San Diego in

1971).

8. I next spoke with a Julie Deutenberg of Albuquerque, New Mexico. In conducting a telephone interview of Julie Deutenberg, she acknowledged that she was the daughter of Fred Deutenberg. She further told me that she had been raised by her grandmother Irene in Philadelphia, Pennsylvania, while her father Fred was serving time in prison. (In our first telephone interview of Genoveva Hernandez, she also told us that Fred had two children who traveled with them, a boy and a girl. Genoveva Hernandez recalled that the girl's name was Julie and that the boy's name was Johnnie. She also told us that Fred's mother, whom they visited, lived in Philadelphia, Pennsylvania.) In my interview with Julie Deutenberg, she confirmed that Fred Deutenberg was deceased and that he had lived in California prior to his death. Julie Deutenberg told us her brother John was also living in California.

9. I also obtained California Department of Motor Vehicle records for "Fred John Deutenberg" which establish that he was a resident of California since as early as September 2, 1987, when his driver's license was issued. The DMV records showed that he had lived in Brawley, Berkeley and Stockton, California, at various times. (DMV records attached).

10. I obtained both a death certificate from the State of California and a birth certificate from Philadelphia, Pennsylvania, for Fred Deutenberg. (Copies are attached).

These documents establish that he was born in the United States. The death certificate states that Mr. Deutenberg was cremated.

11. On July 24, 1995, I went to Mr. Deutenberg's last known address on his death certificate. The new tenant put me in contact with Ms. Donna Butler, who told me she was Fred Deutenberg's granddaughter. Through Ms. Butler, I also met and interviewed her mother, Irene "Ginger" Domer.

12. Irene "Ginger" Domer told me she was Fred Deutenberg's daughter and that she took care of him until he died on April 17, 1994. Ms. Domer also told me that when she was in her mid-20s, she travelled to California with her two young children. On her way to California, she arranged to meet with Fred Deutenberg in Phoenix, Arizona. Ms. Domer told me that Fred came up from Nogales, Mexico, and that he had a young Mexican "girlfriend" with him, who had a very young male child with her. (Ms. Hernandez told me in an earlier interview that she had met Fred Deutenberg's daughter and two grandchildren at a run-down motel in Arizona).

13. I also located Fred Deutenberg's son, John Deutenberg, and interviewed him by telephone. He presently lives in Daly City, California.

The foregoing is true and correct to the best of my belief and knowledge.

DATED this17 day of August, 1995.

/S/
Lydia Serafin

SUBSCRIBED AND SWORN to before me this 17th day of August, 1995.

/S/
NOTARY PUBLIC in and for the State of Washington, residing at Seattle, WA
My appointment expires 8-9-96

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APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,	)	NO.CR95-339Z
	)	
Plaintiff,	)	AFFIDAVIT
	)	OF
vs.	)	MICHAEL
	)	FILIPOVIC
RICARDO AHUMADA-AGUILAR,	)	
	)	
Defendant.	)	
	)	
STATE OF WASHINGTON	)	
	)	ss.
COUNTY OF KING	)	
	)	

I, Michael Filipovic, being first duly sworn and upon my oath, depose and say:

1. I am an Assistant Federal Public Defender for the Western District of Washington. I have been appointed to represent Mr. Ahumada-Aguilar in the above case.

2. In the course of the investigation of this case, we have obtained copies of the archived court records from five federal criminal prosecutions of Mr. Frederick J. Deutenberg from 1971 and 1972. Copies of the relevant copies from four

of these files are contained in Exhibits G through J of the defendant's list of exhibits in support of pretrial motions.

3. A review of these exhibits establishes the following chronology of events. On May 11, 1971, Mr. Deutenberg was indicted for a violation of 18 U.S.C. § 2313 under the name of Fred J. Door. He was accused of selling a stolen motor vehicle. He was arrested in Philadelphia, Pennsylvania, on July 19, 1971, and removed to the District of Maryland by the United States Marshal. On August 2, 1971, he was released on bail in the District of Maryland. A trial was set and one of the witnesses subpoenaed for that trial was a Mr. Daniel G. Hanna. Mr. Deutenberg failed to appear for the trial.[2] See Exhibit G.

4. On June 8, 1972, Mr. Deutenberg was ultimately arrested. See Exhibit J.[3]

5. On July 11, 1972, Mr. Deutenberg was indicted for bail jumping in the District of Maryland under Case No. 72-364. See Exhibit H.

6. On September 11, 1972, Mr. Deutenberg was indicted in the Southern District of Ohio, Eastern Division, for two counts of 18 U.S.C. § 500 and two counts of 18

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[2] This indictment was ultimately dismissed on January 5, 1973, at the same time that he pled guilty and was sentenced on three other indictments.

[3] U.S. Marshal's return on Judgment and Commitment.

U.S.C. § 641. This Southern District of Ohio prosecution (No. 9736) was transferred pursuant to Fed. R. Crim. P. 20 to the District of Maryland for a guilty plea and assigned Case No. 72-572. See Exhibit I.

7. On September 29, 1972, Mr. Deutenberg was indicted in the Eastern District of Pennsylvania for three counts of 18 U.S.C. § 500 and one count of 18 U.S.C. § 641. This Eastern District of Pennsylvania case (No. 72-538) was transferred pursuant to Fed. R. Crim. P. 20 to the District of Maryland for a guilty plea and became Case No. 72-675B. See Exhibit J.

8. Ultimately, Mr. Deutenberg pled guilty in the District of Maryland to the bail jumping (No. 72-364), to one count of possession of stolen government property from the transferred Eastern District of Pennsylvania indictment (Maryland Case No. 72-675B) and to one count of theft of government property from the transferred Southern District of Ohio indictment (Maryland Case No. 72-572). Mr. Deutenberg was sentenced on January 5, 1973, to three years of imprisonment for the bail jumping conviction, to one year of imprisonment for the possession of stolen property conviction, and to one year of imprisonment on the theft of the United States property conviction. Each of these sentences were ordered to be served consecutively to each other. See Exhibits H through J.

9. After his January 5, 1973 sentencing, Mr. Deutenberg was delivered on January 15, 1973, by the United States Marshal, to the medical center for federal prisoners at Springfield, Missouri. The return shows that the defendant was receiving credit for custody since the date of his arrest on June 8, 1972, and that he had not been released on bail after that June 8, 1972 arrest. See Exhibit J.

10. We have also obtained the certified records of the California Department of Motor Vehicles demonstrating that Mr. Deutenberg resided in California. His California license was issued September 2, 1987. See Exhibit F. He died in California on April 17, 1994. See Exhibit E.

11. Based on review of the Department of Motor Vehicle Records, the court records for Mr. Deutenberg's federal prosecutions, a partial rap sheet we have obtained for Mr. Deutenberg, and interviews with his relatives as set forth in the affidavit of Lydia Serafin, it is clear that Mr. Deutenberg has spent more than five years of his life in the United States prior to the birth of Ricardo Ahumada-Aguilar, and that at least two of the five years were after Deutenberg attained the age of 14. He spent at least seven years in federal prison prior to 1971.

12. The federal probation and presentence reports for Mr. Deutenberg have been destroyed due to the age of his convictions.

13. Prior to Mr. Ahumada-Aguilar's first deportation

hearing on November 18, 1991, he was hospitalized for several weeks at the Providence Medical Center due to an extremely serious heart condition. He was taken from INS custody to the hospital due to the gravity of his medical condition. The seriousness of his medical condition is contained in medical records which the defense has obtained from Providence Hospital. After this hospitalization, while still in a weakened condition, he appeared before the immigration court for his first deportation hearing.

The foregoing is true and correct to the best of my belief and knowledge.

DATED this 23 day of August, 1995.

/S/_____
MICHAEL FILIPOVIC

SUBSCRIBED AND SWORN to before me this 23rd day of August, 1995.

/S/_____
NOTARY PUBLIC in and for the State of Washington, residing at King County
My appointment expires 8-29-97